United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

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77-7237

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

NO. 77-7237

BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK

REPLY BRIEF OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS (REPLY TO BRIEF FOR THE UNITED STATES)

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Preliminary Statement

This brief is submitted by the State of New York, as amicus curiae, in reply to the brief submitted by the United States on June 6, 1977, as amicus curiae, pursuant

to orders of this Court entered on May 25, 1977. The Court requested the United States Departments of Transportation and State to respond to certain narrowly formulated questions regarding the validity of the March 11, 1976 resolution of the Port Authority ("PA") under federal law, regulations and orders and international treaties and agreements.

ARGUMENT

THE UNITED STATES HAS CONFIRMED THE VALIDITY OF THE PORT AUTHORITY'S MARCH 11, 1976 RESOLUTION.

The brief of the United States acknowledges "that neither preemption nor conflict is present in this case" (U.S. Brief, p. 8). Citing the same cases and passages from the relevant legislative history relied on by the Port Authority and the State of New York, the federal government has concluded that Congress has not given it preemptive power over airport proprietors such as the PA and that it may not preclude the PA from controlling the use of its facilities

by noisy aircraft.* In addition, the federal government has determined that no conflict exists between the Secretary of Transportation's decision of February 4, 1976 on the Concorde amending the operations specifications of British Airways and Air France (the "Airlines") and the PA resolution of March 11, 1976. Id. Further discussion of the issues of preemption and conflict in this reply brief would only be superfluous.

The United States has for various reasons declined to respond to this Court's question regarding the relationship between the PA's resolution and international agreements and treaties. The State points out that, contrary to the assertion by the United States "that the district court did not reach this issue," the district court did in fact rule, finding the Airlines' grounds of "the claimed conflict of the PA resolution with international agreements and foreign policy" to be inapplicable in this case (JA 181a).

* While the Airlines have termed the decision upholding airport operators' rights in National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Cal., 1976) "an aberration and wrongly decided" (Brief, p. 37), the United States adopts that decision as a "thoughtful and well reasoned opinion" (U.S. Brief, p. 10).

The State of New York agrees that these issues are not applicable, and submits that, even if they were, the PA would prevail for the reasons set forth in the PA's main brief before this Court (pp. I-46 to 64, III-13 to 15).

The United States has, therefore, effectively resolved all key issues before this Court on appeal in favor of the PA. However, in an apparent attempt to divert the Court from the legal questions before it the federal government has gratuitously attempted to interject the "policy" of the federal government on Concorde into this case.

The government brief launches a heated attack on the PA, an attack based on primarily non-legal issues and, in all respects, on issues not before this Court.

The unsolicited statements in the government's brief at pages 2 to 5 concerning federal displeasure with the PA amount to an extraordinary attempt to pressure and influence this Court so as to achieve a desired result despite

the controlling law of preemption and conflict. We are confident that the Court will shrug off the portions of the brief which extol and contradict the government's own stated position on the issues.

The Federal Claim of Unreasonableness and Arbitrariness

The government has on the one hand admitted that it has no power to preempt the PA, but claims that it is not prevented from "criticizing" the PA's action as unreasonable and arbitrary (U.S. Brief, p. 14). The State submits that the government has failed to anchor its criticism in any sound legal argument.

Specifically, the government asserts that

> "the Port Authority's failure to decide [whether the Concorde should be allowed to land on a trial basis] is unreasonable, and when viewed in the context of its past practices and the circumstances here, may be discriminatory or arbitrary as well." (U.S. Brief, p. 20).

The government refers to the prior enforcement by the PA of its restrictions on the operation of jet aircraft with respect to the French Caravelle, the Boeing 707, and the British Comet, stating that each version of new jet technology was afforded an opportunity to comply with the agency's noise regulation and, where compliance was not initially achieved, alterations, such as the addition of noise suppressors, were made.

> "The information gained from testing allowed the aircraft operators an opportunity to make the modifications required to secure compliance." (U.S. Brief, p. 21).

The United States amazingly infers that the Concorde can be modified so as to reduce its noise. This is simply not the case, and all parties are aware that there is no possibility of modifying Concorde to reduce its noise levels, or that step would doubtless have long since been taken.

It is particularly disturbing that the United States would make such an unfounded claim. As Secretary Coleman stated in his decision of February 4, 1976 on Concorde, the decision so highly landed by the Airlines, the federal government and Judge Pollack:

> "All feasible steps have been taken to control the Concorde noise, and

it cannot be modified further to abate the noise levels." (JA 104a).*

The fact that Concorde will not become quieter as its operators gain experience was recently confirmed by the United Kingdom's official Noise Advisory Council, a body set up by the Secretary of State for the Environment to study Concorde.

> "The working group understands that there is no likelihood of any significant improvement in Concorde's noise performance in operation and that no measures are in hand to reduce further its noise at source." (As cited by New York Times, April 20, 1977, p. 5, col. 1 to 3; copy attached as Appendix A).

The federal government wrongfully implies, therefore, that Concorde noise can be suppressed.

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* The Secretary acknowledged the conclusion of the Federal Aviation Administration's Final Environmental Impact Statement ("EIS") on Concorde (p. IV-15):

> "In any event, the application of todays subsonic jet silencing technology to Concorde is not technologically feasible (Ref. 10). Some U.S. Government sponsored research in the area of supersonic jet noise suppression has occurred and is continuing. At this time, however, both the aerodynamic and economic penalties associated with this technology are prohibitive."

This was restated later in the EIS:

> "The Concorde is as quiet and clean as it can be, given the history of its development in relation to the state of the art of noise and emission technology." (EIS, p. X-65).

The federal government next attacks the PA on the basis of the time which it has taken to make a decision on the requests by the airlines to use JFK. It asserts that a final decision was due after a 6 month study period; however, it omits from its brief the critical first paragraph of the PA resolution:

> "Resolved, that the Port Authority deny permission to operate any supersonic aircraft, including the Concorde, at Kennedy International Airport, until after at least six months of operating experience has been evaluated, after a report on such experience has been made to the Board and pending further action thereon by the Board..." (JA 37a, emphasis supplied).

In view of Secretary Coleman's demand for 16 months in which to assess the noise characteristics of Concorde, it is strange and in fact illogical for the government to argue now that the PA necessarily should have acquired all of the relevant information concerning Concorde's performance after only six months.* The PA's actions cannot, on this basis, be viewed as unreasonable, even if its "reasonableness" were at issue here -- which it is not.

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* Actually the Secretary allowed himself a full 4 months in which to simply reassess the preceding 12 months of performance data (JA 72a).

The government would afford the PA even less time in which to review a proposal made by the Airlines on or about March 10, 1977 which would purportedly cut down on Concorde noise. The proposal received mere "technical" approval from the FAA only on April 14, 1977. Predictably, the FAA, in reaching its conclusion as to the technical competence of the proposal, "did not verify the measurements" of the Airlines and has "not confirmed [the Airlines'] statistical assessment" of numerous factors.* (U.S. Brief, p. 31). The State submits that the PA has not been unreasonable in its review of the Airlines' recent proposal, the conclusions of which are seriously at odds with those of the United Kingdom's Noise Advisory Council. (See p. 7, supra).

The United States conceded at the outset of this attack that the issues being raised were unresponsive to the three specific questions of the Court. (U.S. Brief, p. 19). It should have conceded, as well, that the issues are beyond the scope of this appeal.

* Also of interest is the Airlines' proposal to make these noise calculations on the basis of a Concorde take off with 23,000 pounds less fuel than previously assumed by the FAA (U.S. Brief, p. 30). This amount of fuel is greater than Concorde's total of 13,000 pounds holding fuel (30 minutes) plus its 8,000 pounds reserve fuel set forth by the FAA in its Concorde EIS (p. IV-4). One wonders how genuine the Airlines' proposal was.

Without citing any authority or, indeed, even portions of the record, the government has requested this Court to affirm the "result" reached by the district court based on the government's own conclusion that the PA has deliberately refused to determine the Concorde issue, and that that failure is unreasonable (U.S. Brief, p. 25). In effect, the United States, not wanting to preempt the PA, has attempted to impeach the PA's procedure for reaching a decision on Concorde. Such a claim was never raised either in the original pleadings or in the Airlines' motion for summary judgment.*

The United States, after several pages of sabre rattling gauged to influence the Court and the parties, raises issues never even pursued by the Airlines below. The government urges this Court to assume facts in lieu of a record and affirm the result of the district court, which so clearly erred as a

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* Similarly without basis in either the pleadings or the record is the government's statement that

> "It is our understanding that subsonic aircraft regularly violate the [PA's] 112 PNdB limit without being denied future access to JFK or other sanctions." (U.S. Brief, p. 24, emphasis supplied).

matter of law, on entirely new grounds. At the very best, these claims require a review of the Port Authority's actions in State court under Article 78 of the New York Civil Practice Law and Rules. These factual issues should not be resolved on an appeal involving a lower court ruling on a motion for summary judgment.

Upon reflection the motives underlying the officious and accusatory brief of the United States are clear. The government has argued very strongly for this Court to hold that there has been no preemption of the PA so as to ensure a shift in liability for any damage resulting from Concorde noise to the PA and away from the United States. In an effort "to have its cake and eat it too," the United States has contrived an argument to support the district court's judgment allowing Concorde flights into JFK while still insulating itself from liability.*

* It is significant that neither the President nor the Secretary of Transportation has ever accused the PA of acting in a discriminatory, arbitrary or unreasonable manner. Nor have these officials ever before accused the PA of "deliberately refusing" to decide the Concorde question.

The Court should not permit the government to so manipulate these proceedings.

Because the Airlines failed to raise in the district court the arguments now profferred for the first time by the United States, and, moreover, because there is no factual record to support those arguments, this Court should quickly reject the government's claims of unreasonableness and discrimination -- not properly part of this litigation and utterly unsupported. Ramsey v. United Mine Workers of America, 401 U.S. 302, 312 (1971).

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND THE COMPLAINT DISMISSED.

Dated: New York, New York
June 8, 1977

Respectfully sumbitted,

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British Government's Advisers Find Concorde Noisy

By JOSEPH COLLINS.
Special to The New York Times

LONDON, April 19—The British Government's advisers on aircraft noise, in a report made public today, found that the supersonic Concorde airliner exceeded the statutory noise limit on 72 percent of its takeoffs from London's Heathrow Airport. They said it was regrettable that Concorde had been exempted from noise regulations.

After an investigation of the first eight months of Concorde's commercial operation, the Noise Advisory Council, an official body set up by the Secretary of State for the Environment, reported:

"The measurement program has illustrated that the aircraft is considerably noisier than any other commercial airliner and that it reverses the trend towards the development of less noisy aircraft and towards an alleviation of the aircraft noise nuisance problem."

The Department of Trade took issue with the findings and said that another report, by the Civil Aviation Authority, due out next week would show that less than 5 percent of takeoffs had exceeded the limit in the first full year of operation.

Study of 97 Scheduled Flights

The Noise Advisory Council's working group on air traffic noise wrote its report in late 1976 after having studied the first 97 scheduled Concorde flights out of London. The plane is in service between London and Bahrein and, since May 1976, between London and Washington.

The investigation was based on fixed monitoring points at the end of the main runways, where the statutory noise limit is 110 perceived decibels. Unofficial monitoring away from the fixed stations has shown readings of 124 decibels or more.

Commenting on the contention of the makers and operators of Concorde that the plane would become less noisy as pilots gain experience, the report observed:

"The working group understands that there is no likelihood of any significant improvement in Concorde's noise performance in operation and that no measures are in hand to reduce further its noise at source."

In fact, the report said, Concorde is noisier now than it was during test flights in 1975, when it was found to exceed the noise limit somewhat less frequently than it did on scheduled flights.

The report said Concorde was noisier than other commercial jet planes and measures should be taken to alleviate the noise. It suggested that Concorde should be banned from landing and taking off during the night, evening and early morning hours. A Civil Aviation Authority spokesman countered that the plane did not use Heathrow during these periods.

The working group also said British Airways should balance out the noise from Concorde by reducing the number of flights by noisy subsonic aircraft.

New York Times, April 20, 1977
Page 5, cols. 1 to 3.

BEST COPY AVAILABLE

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOHN F. SHEA, III, being duly sworn, deposes and says that he is an Assistant Attorney General in the office of the Attorney General of the State of New York, attorney for Defendants-Appellants herein. On the 8th day of June, 1977 he served the annexed upon the following named persons:

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Attorneys in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said attorneys at the addresses designated by them for that purpose.

John F. Shea

JOHN F. SHEA, III